STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Respondent,

v.

SAMER SHAMI,

Defendant/Applicant.
_____/

Michigan Supreme Court No.: _____

Court of Appeals Docket No.: 327065

Lower Court Case Nos.: 14-011190-FH
(Wayne County Circuit Court)
14S-1880-FY
(19th District Court)

DEFENDANT SAMER SHAMI'S
APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED FOR REVIEW

I. Sam Molasses, LLC, is registered under the Tobacco Products Tax Act as an unclassified acquirer and as a secondary wholesaler, but not as a manufacturer. An enforcement team inspected Sam Molasses' retail premises and found that its manager, Mr. Shami, was: (1) mixing different flavors of hookah tobacco to have different flavor combinations to offer customers; and (2) separately taking plastic bags of hookah tobacco from shipping cases and placing them into tins bearing his own brand and selling the product to other retailers. The tobacco had been manufactured in Jordan and Sam Molasses received it already in as fit a state for human "consumption" (smoking through a hookah pipe) as it would ever be. The People charged Mr. Shami with manufacturing tobacco without a license, a felony under Sections 3 and 8 of the Tobacco Products Tax Act, MCL 205.423(1) and 205.428(3). The Court of Appeals construed the word "manufacture" broadly to encompass "any change in the form or delivery method" and then held that the evidence adduced at the preliminary hearing fit within this standard.

A. The first question presented is whether the standard "any change in the form or delivery method" exceeds the scope of the word "manufacturing?"

Defendant Shami: Yes

People of the State of Michigan: No

Court of Appeals: No

Circuit Court: Yes

District Court: No

B. The second question presented, somewhat contingent upon the answer to the first, is whether the form or delivery method of the tobacco remained the same, despite the mixing and packaging?

Defendant Shami: Yes

People of the State of Michigan: No

Court of Appeals: No

Circuit Court: Yes

District Court: No

II. The enforcement team requested four years' worth of invoices when they arrived for the inspection. Not all invoices were there on the premises. Two vendors faxed invoices to Sam Molasses during the inspection, but a third provided invoices two days later. Invoices from the third vendor reflected purchases of generic hookah tobacco as "Water Pipe Tobacco – Class I." MCL 205.426 requires unlicensed retailers and all licensees to keep invoices reflecting all tobacco purchases and additionally requires the invoice to reflect "the trade name or brand." Unlicensed retailers are required to keep the invoices on their retail premises for four months and thereafter can keep them anywhere they choose for a total period of four years. Licensees must keep their invoices on location for four full years regardless of whether they conduct retail operations. The People charged Mr. Shami with possessing, acquiring, transporting or offering tobacco products other than cigarettes for sale "without proper invoices." The Court of Appeals held that evidence of the invoices' absence from the retail location served as probable cause all by itself and that Mr. Shami could be bound over for trial, irrespective of the issue concerning the propriety of the invoices' information content.

A. The first question presented is whether the statute limits felony liability for recordkeeping failures to the entity level where the business is operated in entity form?

Defendant Shami: Yes

People of the State of Michigan: No

Court of Appeals: No

Circuit Court: Yes

District Court: No

B. The second question presented is whether the statute permits the purchase of generic hookah tobacco with the retention of an invoice accurately reflecting that purchase (without exposing the purchaser to felony liability)?

Defendant Shami: Yes

People of the State of Michigan: No

Court of Appeals: Did not address this issue.

Circuit Court: Yes

District Court: No

STATEMENT IDENTIFYING THE ORDER APPEALED FROM, THE DATE ENTERED AND THE BASIS OF JURISDICTION

Defendant-Applicant Samer Shami seeks leave to appeal the December 15, 2016 published decision of the Court of Appeals in *People v Shami*, ___ Mich App ___ (2016) (Docket No. 327065) (Appendix, Tab 1). This Court may take jurisdiction of the dispute pursuant to MCR 7.303(B)(1).

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS[1]

Introducing Sam Molasses and Hookah Industry Terminology.

Sam Molasses, LLC, operated a retail hookah tobacco store at 15322 West Warren Ave in Dearborn, Michigan.[2] The LLC held licenses as a "secondary wholesaler" and as an "unclassified acquirer" by the Department of Treasury under the Tobacco Products Tax Act, 1993 PA 327[3], but was not registered as a "manufacturer.[4]" As relevant here, the Unclassified Acquirer's license authorized the LLC to purchase Other Tobacco Products ("OTP"), tax unpaid, from sources outside the State of Michigan and then to report and pay the tax and resell the OTP to tobacco retailers and others located in the State of Michigan.[5] OTP generally, references all tobacco products other than cigarettes[6] and includes smokeless tobacco, pipe tobacco, and hookah tobacco. Hookah tobacco in turn refers to a tobacco product that contains a mixture of tobacco, molasses substance and glycerin.[7] Hookah tobacco is smoked in a water pipe.[8] Thus, it is also referred to as water pipe tobacco.[9]

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[1] This appeal stems from bindover decisions and their review following a preliminary examination initiated on December 5, 2014. The District Court Judge was tasked with determining whether the State had produced sufficient evidence to bind Mr. Shami over for trial. Accordingly, this "Statement of Facts" is a summary of evidence presented at the December 5, 2014 and December 19, 2014 hearings, organized here for a complete understanding of the record upon which the District Court Judge ruled, and may not be construed as admissions.

[2] December 5, 2014 Preliminary Examination Transcript, pp. 14-18, 35-36, 71.

[3] December 5, 2014 Preliminary Examination Transcript, pp. 19-20, 32-33, 36.

[4] Entire record.

[5] Instructions for the Tobacco Tax License Application (Form 336), p. 5 (Exh. A); MCL 205.422(z) and 205.427; December 5, 2014 Preliminary Examination Transcript, pp. 32-33, 87.

[6] Application for Non-Cigarette Tobacco Products Stamp (Form 323), p. 2 (Exh. B).

[7] December 5, 2014 Preliminary Examination Transcript, pp. 16-18.

[8] E.g., Hookah n. An Eastern smoking pipe designed with a long tube passing through an urn of water that cools the smoke as it is drawn through. The American Heritage Dictionary of the English Language, 5th ed., Houghton Mifflin Harcourt Publishing Company (2011-2015). Hookah n. A kind of water pipe associated with the Middle East, with a long flexible tube for drawing the smoke through water in a vase or bowl and colling it. Webster's New World Dictionary, 4th ed., Wiley Publishing, Inc. (2010).

[9] E.g., Water Pipe n. 1. A pipe that is a conduit for water. 2. An apparatus for smoking, such as a hookah, in which the smoke is drawn through a container of water or ice and cooled before inhaling. The American Heritage Dictionary of the English Language, 5th ed., Houghton Mifflin Harcourt Publishing Company (2011-2015). Water Pipe n. 1. A pipe for carrying water. 2. A kind of smoking pipe in which the smoke is drawn through water, as a hookah. Webster's New World Dictionary, 4th ed., Wiley Publishing, Inc. (2010).

El Tahan.

One of Sam Molasses' suppliers was El Tahan, which was licensed by the U.S. Treasury as an importer/distributor of hookah tobacco.[10] El Tahan, the importer/distributor, purchased hookah tobacco from a manufacturer located overseas in the country of Jordan.[11] The tobacco was then shipped to a U.S. Customs warehouse where the importer/distributor paid the customs duty and federal excise tax and obtained a release of the tobacco product from Homeland Security.[12] The record contains no evidence of the price El Tahan paid to the manufacturer in Jordan, and neither the State Police nor the Department of Treasury had this information (the price El Tahan paid to the manufacturer) prior to bringing the charges at issue in this case.[13] When Sam Molasses purchased imported tobacco from El Tahan, El Tahan shipped the tobacco to Sam Molasses, and then Sam Molasses sold this "OTP": (a) to retail businesses; or (b) at its own retail location.[14]

May 1, 2013 Administrative Inspection.

On May 1, 2013, a team consisting of staff of the Michigan Department of Treasury and the Michigan State Police visited Sam Molasses' retail location in Dearborn for an unannounced inspection.[15] Participating on Treasury's behalf were Alicia Nordman, manager of Treasury's Tobacco Tax Enforcement Unit, Richard Wright, auditor, and Howard Whitney, audit manager.[16] Participating on behalf of the State Police were Detective Sergeant Stephanie Cleland, Trooper Curtis and Detective Specialist Burdan.[17] This was an administrative inspection, consisting of

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10 December 5, 2014 Preliminary Examination Transcript, pp. 57-60.

11 December 5, 2014 Preliminary Examination Transcript, pp. 57-60, 84-85,

12 December 5, 2014 Preliminary Examination Transcript, pp. 57-60.

13 December 5, 2014 Preliminary Examination Transcript, pp. 57-60, 110-111.

14 *Id.*

15 December 5, 2014 Preliminary Examination Transcript, pp. 14, 24-25, 35-37 70, 80.

16 December 5, 2014 Preliminary Examination Transcript, pp. 14, 24.

17 December 5, 2014 Preliminary Examination Transcript, pp. 35-37 70, 80.

identifying the tobacco products Sam Molasses was selling at the time of the inspection, examining invoices to identify purchases, comparing the invoices to what Sam Molasses reported on its tax returns and ensuring that Sam Molasses had been purchasing from appropriate sources.[18] Administrative inspections occur during normal business hours.[19] The store did not close down during the inspection, and customers came and went.[20]

The premises at 15322 West Warren Avenue in Dearborn is a retail store where Sam Molasses sells molasses tobacco, hookah pipes and accessories.[21] The front of the store is a retail area with cans and boxes of various flavors of molasses tobacco and hookah pipe accessories presented for sale.[22] On arrival at the store, Sergeant Cleland and Trooper Curtis approached a female clerk working behind the cash register area, identified themselves and explained that they were there to conduct an administrative tobacco inspection.[23] They advised the clerk that they would be requesting the last four years' worth of Sam Molasses' invoices for tobacco purchases.[24] The clerk told them that she thought the invoices were in the office and that she would call the owner.[25] The clerk made a phone call to someone who told her that invoices were with Sam Molasses' accountants and gave her the accountants' phone number to give to the State Police.[26] Some of the invoices were there on the premises, and Sergeant Cleland began to examine them.[27] Then Mr. Shami appeared at the store.[28] Sergeant Cleland asked Mr. Shami

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18 December 5, 2014 Preliminary Examination Transcript, pp. 25, 36-37, 87-88.
19 December 5, 2014 Preliminary Examination Transcript, pp. 36-37.
20 *Id.*
21 December 5, 2014 Preliminary Examination Transcript, p. 36.
22 December 5, 2014 Preliminary Examination Transcript, pp. 70-72.
23 December 5, 2014 Preliminary Examination Transcript, p. 37.
24 December 5, 2014 Preliminary Examination Transcript, p. 37.
25 December 5, 2014 Preliminary Examination Transcript, p. 37.
26 December 5, 2014 Preliminary Examination Transcript, pp. 37-38.
27 December 5, 2014 Preliminary Examination Transcript, pp. 41-42
28 December 5, 2014 Preliminary Examination Transcript, pp. 37-38.

whether his wife owned the store.[29] Mr. Shami told her that his wife was named on paperwork but that she did not have any role at the store and that he took care of day-to-day operations.[30] Mr. Shami's wife did not appear at the store during the inspection.[31]

Sam Molasses purchased tobacco from three sources, Sierra Network, Karabeshin and El Tahan.[32] Some of the Karabeshin and Sierra Network invoices were missing from the store at the time of the inspection, but the missing invoices were either faxed or emailed and provided to the Tobacco Tax Enforcement Team that same day.[33] Some of the El Tahan invoices were missing from the store that day, too, and were not provided until two days after the inspection.[34]

Sergeant Cleland examined the invoices on hand at Sam Molasses the day of the inspection.[35] She concluded that invoices from Sierra Network and Karabeshin were "proper," but invoices from El Tahan were not, because the only description was "Water Pipe Tobacco."[36] These invoices contain a date, the seller, the quantity, the weight and price and the description "water pipe tobacco."[37] Sergeant Cleland concluded that "water pipe tobacco" was an insufficient description, because it does not list the specific flavor.[38]

Mr. Shami identified the location of the El Tahan tobacco in the store.[39] Some of it was on the store shelves, but most of it was in the storeroom area.[40] There were seven Tupperware

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29 December 5, 2014 Preliminary Examination Transcript, pp. 38-40.
30 December 5, 2014 Preliminary Examination Transcript, pp. 38-41.
31 December 5, 2014 Preliminary Examination Transcript, pp. 20-21.
32 December 5, 2014 Preliminary Examination Transcript, pp. 44-45.
33 December 5, 2014 Preliminary Examination Transcript, p. 46.
34 December 5, 2014 Preliminary Examination Transcript, pp.46, 88.
35 December 5, 2014 Preliminary Examination Transcript, p. 44.
36 December 5, 2014 Preliminary Examination Transcript, pp. 44-45, 53-54, 68-69, 78-80.
37 December 5, 2014 Preliminary Examination Transcript, pp. 75-77
38 December 5, 2014 Preliminary Examination Transcript, pp. 78-80.
39 December 5, 2014 Preliminary Examination Transcript, p. 54.
40 December 5, 2014 Preliminary Examination Transcript, pp. 54, 71-72.

plastic bins with blue lids in the retail area, across the aisle from the counter.[41] The bins contained hookah tobacco and bore labels with flavors that did not appear on any invoice.[42] Ms. Nordman asked Mr. Shami what was in the plastic bins and whether he had mixed molasses tobacco to offer the blends labeled on the outside of the bins, and Mr. Shami answered in the affirmative.[43]

Treasury has never promulgated rules or any other guidance setting forth its interpretation of the definition of the term "manufacturer" in MCL 205.422(m).[44] Internally, the agency views mixing two flavors as manufacturing, but Treasury has never provided any public guidance about its view.[45] Tobacco Tax Enforcement Team members inform themselves through on-the-job training as well as interpretive guidance from attorneys in Treasury's Tax Policy Division.[46]

Tobacco in the storeroom was mostly contained in cases.[47] Cases from El Tahan bore a sticker identifying the flavor (e.g., watermelon mint), the production date and that the tobacco had been made in Jordan.[48] Inside the cases were clear packets of molasses tobacco.[49] There was a table in the storeroom, and on the table were silver tins and clear plastic bags containing molasses tobacco.[50] Some of the tins were empty and some contained the plastic bags of tobacco.[51] Mr. Shami told the enforcement team that he placed this tobacco in tins, labeled

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41 December 5, 2014 Preliminary Examination Transcript, pp. 16, 27, 67-68.

42 December 5, 2014 Preliminary Examination Transcript, pp. 16-17, 27, 67-68.

43 December 5, 2014 Preliminary Examination Transcript, pp. 15-17

44 December 5, 2014 Preliminary Examination Transcript, pp. 27-32, December 19, 2014 Preliminary Examination Transcript, pp. 16-18.

45 *Id.*

46 December 5, 2014 Preliminary Examination Transcript, pp. 28-29.

47 December 5, 2014 Preliminary Examination Transcript, pp. 54-55.

48 December 5, 2014 Preliminary Examination Transcript, pp. 84-85.

49 December 5, 2014 Preliminary Examination Transcript, pp. 54-55, 71-72.

50 *Id.*

51 December 5, 2014 Preliminary Examination Transcript, p. 72.

"360," for sale.[52] El Tahan is not the manufacturer of the molasses tobacco Mr. Shami placed in these tins: the tobacco is manufactured in Jordan by another entity, placed in small plastics bags and then El Tahan imports it into the United States through U.S. Customs.[53]

Signatures on Tax Documents.

Fadia Shami, Mr. Shami's wife, is the sole member of Sam Molasses LLC.[54] Fadia Shami signed one of the Tobacco Products Tax Electronic Filing Applications for the periods in dispute as President of Sam Molasses.[55] Mohamed Hammoud signed the other Tobacco Products Tax Electronic Filing Application for the periods in dispute as Vice President.[56] During the period 2011 through and including 2013, Hassan Sharara and Mohamed Hammoud were identified on Sam Molasses' electronic tobacco tax filing application as the individuals with authority and responsibility to file tobacco tax returns on behalf of Sam Molasses.[57] On behalf of Sam Molasses Fadia Shami signed Treasury's Form 3999, a Trading Partner Agreement setting forth rights and responsibilities for electronic filing.[58] The clerk present at the time of the May 1, 2013 administrative inspection told an enforcement team member that she had prepared the Unclassified Acquirer Tobacco Tax returns with the help of Mohamed Hammoud.[59]

Government Brings Felony Charges Against Mr. Shami.

In August 2014, the government charged Mr. Shami with the following felonies:

1. Count I – Possession of tobacco products other than cigarettes with a wholesale price of $250 or more, without proper markings on the original manufacturer's shipping case; MCL 205.426; MCL 205.428(3).

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[52] December 5, 2014 Preliminary Examination Transcript, p. 55.

[53] December 5, 2014 Preliminary Examination Transcript, pp. 57-60.

[54] December 5, 2014 Preliminary Examination Transcript, pp. 20-21, 38-41.

[55] December 19, 2014 Preliminary Examination Transcript, pp. 12-16, 21-22. Defendant's Prelim Ex Exhibits I, J and K.

[56] *Id.*

[57] *Id.*

[58] December 5, 2014 Preliminary Examination Transcript, pp. 104-105.

[59] December 5, 2014 Preliminary Examination Transcript, pp. 81-82.

2. Count II – Possession of tobacco products other than cigarettes with a wholesale price of $250 or more, without having a license to manufacture; MCL 205.423, MCL 205.428(3).

3. Count III – Filing a false tobacco tax return for all months of 2011; MCL 205.427(2).

4. Count IV – Filing a false tobacco tax return for all months of 2012; MCL 205.427(2).

5. Count V – Filing a false tobacco tax return for all months of 2013; MCL 205.427(2).

Prior to the commencement of the preliminary examination, the government amended Count 1 and charged Mr. Shami with possession of tobacco products other than cigarettes with a wholesale price of $250 or more without proper invoices in violation of MCL 205.426.

District Court Finds Probable Cause on Counts 1 and 2, But No Probable Cause on Counts 3, 4 and 5.

At the end of the preliminary examination begun on December 5, 2014, and continued to and concluded on December 19, 2014, the District Court Judge found probable cause to bind Mr. Shami over for trial on Counts 1 and 2.[60] (Appendix, Tab 2) For Counts 3, 4 and 5, the District Court Judge found probable cause to believe that Sam Molasses had underreported its Tobacco Tax liability but no evidence to conclude that Mr. Shami controlled, supervised or was responsible for reporting or paying the tax.[61] Accordingly, he dismissed these latter counts against Mr. Shami.

The Circuit Court Reverses on Counts 1 and 2 and Affirms on Counts 3, 4 and 5.

Next, the People moved the Circuit Court to reverse the District Court and add back Counts 3, 4 and 5, and Mr. Shami moved to dismiss the remaining counts, Counts 1 and 2. [62]

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[60] December 19, 2014 Preliminary Examination Transcript, pp. 34-35.

[61] December 19, 2014 Preliminary Examination Transcript, pp. 35-37.

[62] March 13, 2015 Final Conference Transcript, entire transcript.

Oral argument occurred at a final conference held in Wayne County Circuit Court on March 13, 2015.[63] The Circuit Court Judge denied the Peoples' motion to add back Counts 3, 4 and 5, and granted Mr. Shami's motion to dismiss Counts 1 and 2. (Appendix, Tab 3)

The Circuit Court Judge agreed that there was no evidentiary basis to conclude that Mr. Shami was responsible for filing the Tobacco Tax returns.[64] Concerning Count 1, the felony charge of possession of non-cigarette tobacco without proper invoices, the Court reasoned that it might be appropriate to charge the business but, again, there was insufficient evidence to support probable cause to bind Mr. Shami over.[65] Concerning Count 2, the felony charge of possession of other tobacco products without a manufacturer's license, the Court did not view the act of blending two or more flavored hookah tobaccos as manufacturing.[66]

The Court of Appeals Reverses the Circuit Court and Reinstates Counts 1 and 2.

The People appealed the Circuit Court's decision on Counts 1 and 2 to the Michigan Court of Appeals. In an opinion released for publication on December 15, 2016 (Appendix, Tab 1), the Court of Appeals reversed the Circuit Court and remanded for reinstatement of both counts. On Count 1, the Court concluded that the testimony concerning the absence of invoices, some covering purchases within the four-month period prior to the date of the administrative inspection, was sufficient evidence to support the District Court's decision to bind Mr. Shami over, assuming that Mr. Shami were among the class of individuals and entities that fall within the scope of the term "retailer" as set forth in MCL 205.426(1) and 205.422(q)[67] On this latter point, the Court relied on its recent published opinion in *People v Assy,* __ Mich App __, Court

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63 *Id.*

64 March 13, 2015 Final Conference Transcript, pp. 24-25.

65 *Id.*

66 March 13, 2015 Final Conference Transcript, p. 25.

67 December 15, 2016 slip opinion, pp.4-6.

of Appeals Docket No. 326274 (July 14, 2016) (Appendix, Tab 4) for the proposition that a manager with control of a tobacco products retail store's day-to-day operations is a "retailer" whether he or she owns the business or not. Since the People had produced evidence that Mr. Shami managed the day-to-day operations of Sam Molasses, the Court of Appeals concluded that the District Court had not abused its discretion in binding Mr. Shami over on Count 1 and reversed the Circuit Court.

On Count 2, manufacturing tobacco without a license, the Court of Appeals consulted Merriam-Webster's Collegiate Dictionary (11th Ed) for its definition of the term "manufacturer." Based on this definition, the Court concluded that the term "simply requires a change from the original state of an object or material to a state that makes it more suitable for its intended use" and "that a mere change in the form or delivery method of tobacco is sufficient to constitute manufacturing or producing under the Act."[68] The People had adduced evidence that Mr. Shami had blended different flavored tobaccos. The People had also adduced evidence that Mr. Shami had placed small bags of hookah in tin cans and sold it under his own label. The Court of Appeals combined these two separate activities and determined that Mr. Shami had "changed, however slightly, the form and delivery method of the tobacco."[69] Accordingly, the Court of Appeals held that the District Court judge had not abused his discretion in binding Mr. Shami over on Count 2 and that the Circuit Court had committed reversible error.[70] The Court of Appeals reversed and remanded the matter for further proceedings consistent with its opinion.[71]

This application for leave to appeal ensued.

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[68] December 15, 2016 slip opinion, p. 6.

[69] December 15, 2016 slip opinion, pp. 6-7

[70] December 15, 2016 slip opinion, p. 7.

[71] *Id.*

LEGAL ARGUMENT

I. Introduction To The Arguments And Discussion Of Michigan Court Rule 7.305(b) Factors.

A. Synopsis: On the Felony Charge of "Manufacturing Tobacco Without a License", the Court of Appeals Ignored Longstanding Principles of Statutory Construction of Tax and Criminal Statutes, and Erred by Applying an Overly Broad and Vague Definition of "Manufacturing" to Evidence that Does Not Exist.

The legislature passed the Tobacco Products Tax Act in 1993.[72] The Act requires licensure for legal commerce in tobacco in Michigan down to, but not including, the retail level. As relevant here, MCL 205.423 requires a tobacco manufacturer to obtain a license from the Department of Treasury before operating in Michigan. Unlicensed tobacco manufacturing is a felony. MCL 205.428.

MCL 205.422 contains definitions for words used throughout the Act. It provides a circular definition pertaining to tobacco manufacturing and a very narrow definition pertaining only to operators of cigarette making machines:

> (m) "Manufacturer" means any of the following:
>
> (i) A person who manufactures or produces a tobacco product.
>
> (ii) A person who operates or who permits any other person to operate a cigarette making machine in this state for the purpose of producing, filling, rolling, dispensing, or otherwise generating cigarettes. A person who is a manufacturer under this subparagraph shall constitute a nonparticipating manufacturer for purposes of sections 6c and 6d. A person who operates or otherwise uses a machine or other mechanical device, other than a cigarette making machine, to produce, roll, fill, dispense, or otherwise generate cigarettes shall not be considered a manufacturer as long as the cigarettes are produced or otherwise generated in that person's dwelling and for that person's self-consumption. For purposes of this act, "self-consumption" means production for personal consumption or use and not for sale, resale, or any other profit-making endeavor.

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[72] Tobacco Products Tax Act, 1993 PA 327.

The Act provides no other guidance as to the meaning of the term "manufacturing." The legislature expressly provided Treasury authority to promulgate rules to implement the Act, MCL 205.433(2), but over the Act's twenty-three year existence, Treasury has never provided a definition. Twenty-three years have passed since enactment – twenty-three years into enforcement – and Treasury now invokes the Courts' guidance:

> Furthermore, the statutory definition of a "manufacturer" under the TPTA is circular and clarification from this Court is needed to determine what the plain meaning of that term means. The People believe this Court should look to the dictionary definition, other sections of the TPTA, other legislative definitions, *or prior cases on manufacturing in other areas of law* to give plain meaning to "manufacturer" as used in the TPTA. [Italics added.[73]]

Treasury's Brief on Appeal, p. 3. Mr. Shami's liberty and property hang in the balance due to felony charges contingent on a word whose meaning the People of the State of Michigan acknowledge is not clear without consulting numerous sources and requires learned legal intervention.

The People have charged Mr. Shami with unlicensed tobacco manufacturing, a felony. The process for making hookah tobacco is not complex: it can even be done at home with some simple ingredients – raw tobacco, honey, molasses, glycerine, other flavorings – and equipment such as foil and an oven. The tobacco is washed, ingredients are added, and the tobacco can be baked in foil. State Police and Treasury officials inspected Sam Molasses' retail premises and found none of the items or ingredients for making hookah tobacco. At the preliminary hearing, the People presented no evidence at all to support a finding that someone associated with Sam Molasses was making hookah tobacco. Instead, they found that Mr. Shami was mixing different flavors of bulk hookah tobacco (he was not flavoring the tobacco) received in a condition already as fit for human consumption as it would ever be. They also found that he was packaging other

[73] The reason for the added italics will appear in section II.G. where we discuss an important opinion addressing the scope of manufacturing under the Use Tax.

tobacco, that is, he was taking tobacco, sealed and shipped in small plastic bags, from shipping cases and placing the plastic bags into tins with "360" marked on them. These discoveries are all the people had to charge Mr. Shami with felony manufacturing, and the evidence does not support the charge.

The Court of Appeals deemed it appropriate to center its analysis on a single dictionary definition; and then broadened this definition by reference to the special definition in MCL 205.422(m)(ii) for operators of cigarette-making machines. The resulting standard – "any change in the form or delivery method of tobacco, rather than a specific type or method of change" – might still be workable if applied carefully: there is no evidence of any change in the form of the tobacco, and the delivery method began and remained a hookah pipe. The Court of Appeals was distracted by the flavor combinations and the tins, which simply do not establish the change focused upon in the statute. Before and after mixing, the hookah tobacco is in a state as fit for human consumption as it will ever be. Mixing does not change it. Moreover, the analog to the cigarette in MCL 205.422(m)(ii) is the hookah pipe, not the tin or bag the tobacco may come packaged in. There is no evidence of any change in delivery method. Moreover, the Court appears to have connected the two unrelated activities of mixing and packaging. These were two unrelated activities involving different inventory. Principles of statutory construction for tax statutes and criminal statutes (and criminal tax statutes) do not generally permit stretching the wording of the statute to cover activities not within their scope, and the Court of Appeals' boundless standard does just that.

There is a difference between retail strategy and manufacturing. Mr. Shami took a product manufactured by another business in another country, a product already in a form as fit for human consumption as it would ever be, and offered different combinations to enhance the

product's attractiveness and increase sales. Retailers engage in this type of activity all the time.[74] Unbeknownst to Mr. Shami, because the State has never published any guidance on the subject, attorneys in Treasury's Tax Policy Division have advised enforcement agents that mixing is manufacturing. As we will discuss more fully below, the Court of Appeals' abridged approach to statutory construction of the word "manufacture" and misapplication of its expansive definition to the facts only encourages this silent approach to enforcement.

B. Synopsis: On the charge of "Failure to Maintain Proper Invoices," There is no Basis in the Statutory Language to Extend a Flow-Through Felony Liability to Retail Managers While Shielding Managers of all Non-Retail Licensees From Such Liability. This Exercise in Statutory Construction Masked the Issue the Parties Actually Litigated: Whether Acceptance of a Generic Tobacco Product With an Invoice Accurately Describing that Generic Product Violates the Tobacco Products Tax Act's Recordkeeping Requirements.

The People have charged Mr. Shami with a felony for failure to keep "proper" invoices within the requirements of MCL 205.426(1). In reversing the Circuit Court and reestablishing this charge, the Court of Appeals concluded that a manager involved in day-to-day retail operations faces potential felony liability for any invoices missing from the store. Based on this conclusion, the Court avoided the question the parties actually briefed: whether a tobacco distributor's fully accurate description of a generic product on an invoice in the absence of a trade or brand name will support a felony charge for a licensee who accepts the invoice.

Careful review of the statute and the record reveals that liability does not flow through the entity retailer to its manager and that acceptance of a generic product along with an invoice accurately describing/identifying that generic product is not a felony. Meanwhile the opinion's statewide effect leaves retail managers in danger of unbridled State Police discretion to criticize

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[74] For example, Ishkabibbles on South Street in Philadelphia serves the Gremlin, a mix of lemonade and grape soda pop. Nobody cares who made the lemonade and nobody cares who made the soda pop. On a hot summer day, drinking this mixture turns gritty, quirky South Street into paradise. In common understanding, Ishkabibbles is not a manufacturer.

accurate invoices. It leaves them in fear that the location of even a single invoice off-premises for any reason, good or bad, legitimate or illegitimate, known or unknown, will result in felony charges.

C. Several Factors Set Forth in Michigan Court Rule 7.305(B) Establish that Granting this Application and Adjudicating Mr. Shami's Appeal Will Transcend Error Correction: 1) the Court of Appeals' published decision on the meaning of "manufacturing" under the Tobacco Products Tax Act affects an entire industry and broadens the scope of potential felony liability for all entities and individuals participating in it; 2) the Court of Appeals' opinion breaks from longstanding principles of statutory construction for tax and criminal cases; 3) the decision is clearly erroneous and perpetuates material injustice; and 4) the opinion encourages the development of secret administrative law, bypassing the requirements of the Administrative Procedures Act.

The factors set forth in Michigan Court Rule 7.305(B) are intended to ensure that the significance of an appeal extends beyond mere error correction. Several of these factors support this application for leave to appeal. The impact of the Court of Appeals' published decision in this case is important to the state's Tobacco Products Tax enforcement efforts and to the interests of every licensee operating in Michigan, particularly so when the implications of the Court's ruling on managers' potential felony liability and the potential loss of liberty and property is taken into account. The Court of Appeals' broad construction of the word "manufacture" and its misapplication to the facts here leave an entire industry at risk of felony prosecution without any real standard to guide conduct. The Tobacco Products Tax Act, as written, provides broad discretion to unelected administrative officials guided by a cloistered group of attorneys in Treasury's Tax Policy Division more focused on civil tax administration than criminal tax enforcement. Indeed, Treasury has developed rules in secret to guide agents, rules whose development entirely bypasses the safeguards of the Administrative Procedures Act.

The issues raised in this dispute involve legal principles of major significance to the state's criminal tax jurisprudence, and the case is one by or against the state. The Court of

Appeals' decision breaks with the common approach to statutory construction in cases involving taxes, in cases involving criminal liability and in the intersection of the two (involving tax provisions with attached criminal liability). The decision is clearly erroneous and perpetuates material injustice. Lastly, if the Court of Appeals' misconstruction and misapplication of the statute is upheld, it is void for vagueness under federal Constitutional principles, raising a substantial question about its validity.

II. The Court of Appeals Erred Either in Construction or Application: The People Presented No Evidence From Which the District Court Could Have Concluded That Mr. Shami Was Manufacturing Hookah Tobacco At Sam Molasses' Store.

A. Introduction: the Charge, the Evidence and the Error.

At the preliminary hearing employees of the Department of Treasury and the Michigan State Police testified about discovering Tupperware containers in the retail area of Sam Molasses and that Mr. Shami admitted to mixing hookah tobacco flavors to create different blends for his customers.[75] They also testified to finding tins and clear plastic bags in the warehouse area and that he admitted to taking small plastic bags of hookah tobacco from shipping cases and placing them into tins with the branding "360" on them.[76] The resulting felony charge is that Mr. Shami "did possess, acquire, transport, or offer for sale tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more, without having license to manufacture tobacco products as required by MCL 205.423; contrary to MCL 205.428(3). [205.4282]" The charge carries a penalty of 5 years and/or $50,000, plus the tax imposed by the Tobacco Products Tax Act and a penalty of 500% of the amount of tax due.[77]

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[75] December 5, 2014 Preliminary Examination Transcript, pp. 15-17, 27, 54, 67-68, 71-72.

[76] December 5, 2014 Preliminary Examination Transcript, pp. 54-55, 71-72.

[77] The State Police have mixed the penalty portions of two separate sections of MCL 205.428, sections (1) and (3), but only identify section (3) in the charge.

The Tobacco Products Tax Act defines the term "manufacturer" circularly (with reference to itself), and the Court of Appeals properly identified statutory construction as central to resolution of the appeal. But instead of identifying purpose and context and bringing the relevant principles of statutory construction to bear, the Court relied on a single dictionary definition to establish legislative intent through a non-contextual "ordinary meaning." The Court arrived at an improperly broad standard – mere change in form or use – and then misapplied it. Change is certainly the hallmark of manufacturing, but the record contains no evidence of any change nor evidence that Mr. Shami made anything. The result the Court of Appeals reached is at odds with any plain meaning or common understanding and does not provide fair warning.

B. Standard of Review

The Court of Appeals' construction of the term "manufacturer" as set forth in MCL 205.422(m) is subject to *de novo* review. *Fluor Enterprises, Inc v Revenue Division, Department of Treasury,* 477 Mich 170, 174; 730 NW2d 722 (2007). Moreover:

When reviewing a bindover decision, the following standards apply:

> A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed [de novo] for error, and a decision to bind over a defendant is reviewed for abuse of discretion. In reviewing the district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion.... Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. [*People v Orzame*, 224 Mich App 551, 557, 570 NW2d 118 (1997) (citations omitted).]

People v Beydoun, 283 Mich App 314, 322; 770 NW2d 54 (2009). Application of an incorrect legal standard is an abuse of discretion:

> A district court's decision regarding a bindover is reviewed for an abuse of discretion, and "[a court] necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 131–132, 818 NW2d 432 (2012). Statutory construction

> is a question of law that is reviewed de novo. *People v Morey*, 461 Mich 325, 329, 603 NW2d 250 (1999).

People v Feeley, 499 Mich 429, 434; 885 NW2d 223 (2016).

C. The Nature and Historical Development of the Tobacco Products Tax Act

The Court of Appeals previously reviewed the nature and historical development of the Tobacco Products Tax Act in *People v Nasir,* 255 Mich App 38, 42-43; 662 NW2d 29 (2003):

> The crime of possessing or using counterfeit tax stamps is not a creature of the common law. Defendant argues that it derives from the common-law crime of forgery, and thus should include a mens rea element.2 We disagree. While elements of forgery inform M.C.L. § 205.428(6), it is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded.
>
> * * * * *
>
> MCL 205.428(6) is a revenue provision, not a public welfare law. The statute is not designed to place the burden of protecting the public welfare on an "otherwise innocent" person, *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943), who is in a position to prevent an injury to the public welfare "with no more care than society might reasonably expect...." *Morissette*, supra at 256, 72 S.Ct. 240. While the regulation of the sale and consumption of cigarettes is a public health concern, this statute only tangentially touches on these matters. In 1997, the Tobacco Products Tax Act, M.C.L. § 205.421 et seq., was amended in order to deal with what was identified as the substantial and widespread smuggling of cigarettes into Michigan in order to circumvent the tax levied on each pack of cigarettes. To combat this problem, the Legislature enacted a tax stamp program, 1997 PA 187, which included the creation of the offense in issue.

See also People v Beydoun, 283 Mich App 314, 327-329; 770 NW2d 54 (2009). Any approach to statutory construction should acknowledge the Act's origin and purpose as a measure to protect the revenue, and not as a public welfare law. The statute is structured to ensure that tobacco does not enter Michigan undetected and untaxed.

D. The Statutory Framework Creates a Detection System Through Licensing, Licensing is Classified by Capacity, and the Critical Definition of the Term "Manufacture," a Key Capacity Concept in the Statutory Scheme, is Circular.

As relevant here, section 8 of the Tobacco Products Tax Act (MCL 205.428) provides:

> (1) A person, other than a licensee, who is in control or in possession of a tobacco product contrary to this act, who after August 31, 1998 . . . does sell a tobacco product to another for purposes of resale without being licensed to do so under this act, shall be personally liable for the tax imposed by this act, plus a penalty of 500% of the amount of tax due under this act.
>
> (3) A person who possesses, acquires, transports, or offers for sale contrary to this act . . . tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more . . . is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

Section 3 of the Tobacco Products Tax Act (MCL 205.423) casts the wide enforcement net and provides:

> (1) Beginning May 1, 1994, a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so. A license granted under this act is not assignable.

Section 3 also envisions that licensees may act simultaneously in different capacities, requiring separate licensing for each capacity:

> (2) *Upon proper application and the payment of the applicable fee, and subject to subsection (6), the department shall issue a license to each manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter*. The application shall be on a form prescribed by the department and signed under penalty of perjury. Except for transportation companies, each place of business shall be separately licensed. *If a person acts in more than 1 capacity at any 1 place of business, a license shall be procured for each capacity*. Each machine for vending

> tobacco products shall be considered a place of retail business. Each license or a duplicate copy shall be prominently displayed on the premises covered by the license. In the case of vending machines, a disc or marker furnished by the department showing it to be licensed shall be attached to the front of the machine in a place clearly visible to the public. [Italics added.]

Moreover, the fee structure set forth in Section 3 specifically envisions an unclassified acquirer operating in different ways:

> (3) The fees for licenses shall be the following:
> (a) A wholesaler's license, $100.00.
> (b) A secondary wholesaler's license, $25.00.
> (c) A license for vending machine operators, $25.00.
> (d) An unclassified acquirer's license, as follows:
> (i) State of Michigan, no fee.
> (ii) Retail importer of tobacco products other than cigarettes, $10.00.
> (iii) Retail importer of cigarettes, $100.00.
> (iv) Vending machine operator buying direct from a manufacturer, $100.00.
> (v) Manufacturer, $100.00.
> (vi) Any other importer, $100.00.
> (e) A transportation company's license, $5.00.
> (f) A transporter's license, $50.00.

Under this structure, if an "unclassified acquirer" maintains a retail location and also acts as a "manufacturer" at that location, it has to hold and display two distinct licenses.

Section 2(o) of the Tobacco Products Tax Act (MCL 205.422(o)) defines "person" as "an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity." Section 2(p) defines "place of business" as "a place where a tobacco product is sold or where a tobacco product is brought or kept for the purpose of sale or consumption, including a vessel, airplane, train, or vending machine." Section 2(q) defines "retailer" as "a person other than a transportation company who operates a place of business for the purpose of making sales of a tobacco product at retail." Section 2(z) defines the term "unclassified acquirer" as:

> a person, except a transportation company or a purchaser at retail from a retailer licensed under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, who imports or acquires a tobacco product from a source other than a wholesaler or secondary wholesaler licensed under this act for use, sale, or distribution. Unclassified acquirer also means a person who receives cigars, noncigarette smoking tobacco, or smokeless tobacco directly from a manufacturer licensed under this act or from another source outside this state, which source is not licensed under this act. An unclassified acquirer does not include a wholesaler.

Notice that the latter three definitions utilize the word to be defined in the definition, but do not appear to present any particular interpretive difficulty in this dispute. However, Section 2(m) defines the term "manufacturer" as either:

> (i) A person who manufactures or produces a tobacco product.
>
> or
>
> (ii) A person who operates or who permits any other person to operate a cigarette making machine in this state for the purpose of producing, filling, rolling, dispensing, or otherwise generating cigarettes. A person who is a manufacturer under this subparagraph shall constitute a nonparticipating manufacturer for purposes of sections 6c and 6d. A person who operates or otherwise uses a machine or other mechanical device, other than a cigarette making machine, to produce, roll, fill, dispense, or otherwise generate cigarettes shall not be considered a manufacturer as long as the cigarettes are produced or otherwise generated in that person's dwelling and for that person's self-consumption. For purposes of this act, "self-consumption" means production for personal consumption or use and not for sale, resale, or any other profit-making endeavor.

Sam Molasses is licensed as an unclassified acquirer. It purchases other tobacco products from non-licensed suppliers. If it were engaged in manufacturing activities on its retail premises, it would be required to hold and display both the unclassified acquirer's license and a manufacturer's license or risk felony liability. For Charge 2, the parties dispute the scope of the term "manufacture." Where the statute kicks the can down the road to the administrator (MCL

205.433(2)) and the administrator kicks the can down the road to the courts (Treasury's Brief to the Court of Appeals, p. 5), the litigating administrator and the courts should probably define the term with extreme care, because a) they are not the legislature; and b) a Michigan citizen's liberty and property are at stake.

E. The Scope of a Tax Statute Cannot be Extended by Implication or Forced Construction. Citizens are Entitled to Fair Warning of the Traps That Await Them in the Criminal Law, and Where Felony and Tax Intersect, the Courts Need to Remain Particularly Vigilant.

The provisions under scrutiny here are not deduction, exemption or credit, and their scope cannot be stretched to activity not clearly within their coverage:

> Tax exactions, property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer.

In re Dodge Bros, Inc, 241 Mich 665, 669; 217 NW 777 (1928) (statute was silent as to whether common law situs rule for intangibles was intended to apply, and court declined to step into the legislature's role and vary the scope when the legislature could speak clearly on its own behalf.) *LaBelle Management v Department of Treasury*, 315 Mich App 23, __; __ NW2d __ (2016) (Slip op., p. 3)

A similar principle governs statutory construction of criminal laws:

> It is a fundamental rule of construction of criminal statutes that they cannot be extended to cases not included within the clear and obvious import of their language. And if there is doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant. In other words, nothing is to be added by intendment.

People v Ellis, 204 Mich 157, 161; 169 NW 930 (1918) (language of abandonment statute required actual threat of prosecution for desertion prior to the marriage, husband could not be

prosecuted under abandonment statute just because he would have been liable to prosecution for desertion prior to marriage). Especially in criminal tax statutes, where there is an administrative tendency to interpret from a technical, tax policy standpoint, sometimes to the detriment of common understanding of business practices in a real-world context, courts should be vigilant to protect individual rights:

> We hesitate to conclude that a failure to file an unverified schedule is given the same dignity as the failure to file the verified return. We are dealing with criminal sanctions in the complicated, technical field of the revenue law. The code and the regulations must be construed in light of the purpose to locate and check upon recipients of income and the amounts they receive. See S.Rep. No. 103, 65th Cong., 1st Sess. 20. But at the same time every citizen is entitled to fair warning of the traps which the criminal law lays. Where the 'return' prescribed is a verified Form 1096 together with all the unverified Forms 1099 it does not seem fair warning to charge a person for more than the failure to make that return. To multiply the crimes by the number of Forms 1099 required to be filed is to revise the regulatory scheme. So far as these information returns are concerned, the purpose of s 145(a) seems to us to be fulfilled when the sanction is applied only to a failure to file Form 1096.

United States v Carroll, 345 US 457, 460; 73 S Ct 757; 97 L Ed 1147 (1953).

In *United States v Carroll*, the United States Supreme Court focused on the structure and purpose of the statute and concluded that the government had brought only one valid count, the count for the missing 1096. Each of the 101 missing 1099s could not serve as the basis for a separate violation. The Tobacco Products Tax Act is not a public welfare law, Sam Molasses is already licensed as an unclassified acquirer and as a secondary wholesaler, the felony manufacturing count serves no additional enforcement purpose, and the statute does not provide Mr. Shami fair warning that a common retail activity would subject him to criminal liability for manufacturing without a license.

F. Bearing in Mind the Overall Statutory Structure and Purpose, as Well as the Interpretive Principles Discussed Immediately Above, We Turn Next to Dictionary Definitions and Learn That the Evidence of Mr. Shami's Actions Adduced at the Preliminary Hearing Does Not Fit Within Any Plain Meaning of the Word "Manufacturing."

Merriam-Webster's Collegiate Dictionary, 11th Ed., Merriam-Webster, Inc, Springfield, Massachusetts (2014) defines[78] the verb form of "manufacture" as:

> 1: to make into a product suitable for use
> 2a: to make from raw materials by hand or by machinery
> 2b: to produce according to an organized plan and with division of labor
> 2c: prefabricate
> 3: invent, fabricate
> 4: to produce as if by manufacturing: create

Webster's New World College Dictionary, 4th Ed., Wiley Publishing, Inc, Cleveland OH (2010) defines the verb form of "manufacture" as:

> 1. to make by hand or, esp., by machinery, often on a large scale and with division of labor
> 2. to work (wool, steel, etc.) into usable form
> 3. to produce (art, literature, etc.) in a way regarded as mechanical and uninspired
> 4. to make up (excuses, evidence, etc.); invent, fabricate, concoct

The American Heritage Dictionary of the English Language, 5th Ed., Houghton, Miflin, Harcourt Publishing Company (2011) defines the verb form of "manufacture" as:

> 1.a. To make or process (a raw material) into a finished product, especially by means of a large-scale industrial operation.
> 1.b. To make or process (a product), especially with the use of industrial machines
> 2. To create, produce, or turn out in a mechanical manner: "His books seem to have been manufactured rather than composed" (Dwight MacDonald)
> 3. to concoct or invent; fabricate: manufacture an excuse.

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[78] This is the definition used by the Court of Appeals.

Senses 1 and 2a-b from the Merriam-Webster's definition, senses 1 and 2 from the Webster's definition and senses 1.a. and 1.b of the American Heritage definition are contextually relevant. Mr. Shami has admitted mixing two or more flavors of hookah tobacco and selling the mixture to customers. The tobacco is manufactured in Jordan and arrives in a state as fit for human consumption as it will ever be. Mr. Shami does nothing to place it in a state of greater fitness for human consumption. He is not making or processing anything or working it into a usable form, he is not starting with raw material and turning it into an end product, there are no industrial machines or operations, there is no division of labor. There is no evidence that the State Police found any of the ingredients or equipment for making hookah tobacco on the premises. What Mr. Shami actually does, the mixing of tobacco that arrives already flavored and the entirely separate packaging of unmixed tobacco, both products already finished in a previous process conducted by someone else, someplace else, does not fit these definitions. In other words, we would have to stretch the meaning of the word "manufacture" to fit the evidence offered at the preliminary hearing. Surely, we should construe the word as broadly as its plain meaning will support, but we have to take care not to stretch it beyond that point, especially since we are construing a tax act with potential felony liability for noncompliance.

Products typically reach a retailer fit for use or consumption. The retailer's mission is to make the sale. Making inventory more attractive to potential customers in order to increase sales is a typical retail activity. The example in footnote 72 (above) of mixing lemonade and grape soda pop is almost passé: walk into many restaurant franchises now, and treat yourself to a fountain drink of many flavor recombinations at the push of a button. There are any number of retail strategies from contrasting clothing colors to grouping related items strategically (so that the consumer walks out with the item that brought him into the store, plus other items he might not otherwise have remembered he needs), to better display lighting, the imagination is the limit.

Nothing in the testimony from the preliminary hearing suggests that Mr. Shami engaged in anything more than typical retail activity to enhance the appeal of Sam Molasses' inventory. If the Enforcement Team had walked in and found stores of dried or soaking tobacco leaves, molasses, honey, glycerine, flavorings, foil and an oven (the ingredients and equipment for making hookah tobacco), we might be having a much different conversation. However, the People presented nothing at the preliminary hearing to suggest that Mr. Shami was doing anything more than taking a product already as fit for human consumption as it would ever be and trying to combine it in ways to offer more exotic options to boost retail sales. Put simply, the ordinary meaning of the word "manufacture" has to be stretched to cover Mr. Shami's actions in this retail setting.

G. Justice Cavanagh's Concurring and Dissenting Opinion in E*lias Brothers,* is Persuasive Support for the Conclusion That Mr. Shami was not Manufacturing Hookah Tobacco.

An individual searching for guidance as to what constitutes manufacturing in tax law would have been well-advised to read Justice Cavanagh's concurring and dissenting opinion in *Elias Brothers Restaurants, Inc v Department of Treasury*, 452 Mich 144, 549 NW2d 837 (1996). In *Elias Brothers* this Court addressed whether the cost of equipment used in production of food and beverages was eligible for the industrial processing exemption under the use tax to the extent that the items produced were sold at retail in the company's own restaurants. Treasury had stipulated that the equipment was eligible for the industrial processing exemption to the extent it was used to produce food and beverage sold to franchisees, who, in turn, made retail sales to customers in their own restaurants. The majority held that the use of the equipment, not the ultimate destination of the food and beverages, controlled the outcome, that the equipment was put to the same use irrespective of the destination of the product, and that due to Treasury's admission that the equipment qualified to the extent of the 75% use for production of food sold

to franchisees, the remaining 25% was an exempt use as well. *Id.*, 452 Mich at 156-157. Due to Treasury's admission of the equipment's eligibility to the extent of its use in production of food sold to franchisees, the majority did not focus on the actual use to determine whether it constituted manufacturing or retail.

Justice Cavanagh concurred in part and dissented in part and wrote a separate opinion. His opinion focuses on the difference between manufacturing, which qualifies for the industrial processing exemption, and retail food and beverage preparation, which is specifically excluded from eligibility.[79] *Id.*, 452 Mich at 159-168. The standard gleaned from his survey of food-preparation related precedent from numerous jurisdictions essentially is change from the original state. He posits a spectrum with highly technical operations at the manufacturing end and simple washing and serving at the food preparation end. *Id.*, 452 Mich at 164. Viewed against this standard and spectrum, it is quite clear that the evidence of Mr. Shami's mixing or packaging activities adduced at the preliminary hearing is insufficient to support the felony manufacturing charge, as nothing is changed in either form, composition or character (it starts and ends as hookah tobacco fully ready for smoking) and the activities fall at or close to the food preparation, non-manufacturing end of the spectrum.[80]

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[79] Justice Cavanagh agreed that the actual use of the equipment was determinative but would not have decided the outcome based on the government's admission. Instead, he developed a standard for determining whether the use constituted manufacturing or food preparation and would have examined the actual use to which each piece of equipment was put.

[80] Packaging typically is not eligible for the industrial processing exemption unless it is used to accomplish significant additional change to the product. *Compare*, *Bay Bottled Gas Company v Michigan Department of Revenue*, 344 Mich 326, 329; 74 NW2d 37 (1955) (propane storage tanks and cylinders did not result in any change in character of the propane and did not qualify for the industrial processing exemption) *with Michigan Allied Dairy Ass'n v Auditor General*, 302 Mich 643, 649-651; 5 NW2d 516 (1942) (Milk bottles and cans used to render milk suitable for marketing qualified for industrial processing exemption.) There is no evidence in the transcript of the preliminary hearing that the tins did anything more than serve as packaging.

H. Whether the Court of Appeals Stretched the Scope of the Statute in Construction or in Application, it Committed Reversible Error.

The Court of Appeals' opinion mentions nothing about the historic tax and criminal law interpretive prohibitions against stretching words either in interpretation or application. The opinion appropriately turns to the dictionary for ordinary meaning but then incorporates an observation drawn from the non-applicable definition pertaining to cigarette-making machine operators:

> As the prosecutor points out on appeal, the definition of "manufacturer" in MCL 205.422(m)(*ii*) includes someone who simply rolls cigarettes from loose tobacco. Therefore, the statutory context suggests that any change in the form or delivery method of tobacco, rather than a specific type or method of change, constitutes manufacturing under the TPTA. [*Shami*, slip opinion, pp. 6-7]

Had the Court fully understood the significance of its own words "change in the form or the delivery method," Mr. Shami would be entirely free of the felony manufacturing charge as a matter of law. There was no change in the "form" of the tobacco, it began as hookah tobacco fully fit for human consumption and remained in exactly that form. Moreover, the "delivery method" began and remained a hookah pipe. The Court of Appeals focused, instead, on the tins, which simply do not serve the type of delivery method identified in the statute. The analog to the cigarette in the statute is the hookah pipe, not the tin the tobacco may come packaged in. If there is any standard to draw from the special definition for cigarette machine operators, it is that the act of operating machinery to pack loose smoking tobacco into a special disappear-as-you-puff cylindrical paper dispenser to ready the tobacco for inhalation is still considered manufacturing. Yet the transcript of the preliminary hearing is devoid of any testimony that Mr. Shami was using machinery to pack hookah tobacco into pipes to place it in a state ready for consumption.

Lack of familiarity with the record may also have contributed to the Court's misapplication of the law, if that is what occurred. The mixing activity and packaging activity were two unrelated activities involving different tobacco inventory. The People presented no evidence that Mr. Shami mixed flavored tobacco and then packaged it under his own brand. The evidence adduced at trial is that Mr. Shami took tobacco directly from shipping cases, still in the plastic pouches in which it was shipped, and placed the pouches into the tins.[81] His flavor blends were from different inventory and were presented for sale in blue Tupperware bins located in the retail area of the store.[82] On page 7 of the slip opinion the Court of Appeals reasons:

> Applying the facts in this case, defendant manufactured or produced tobacco for purposes of the TPTA when he repackaged and mixed different flavors of tobacco because he changed, however slightly, the form and delivery method of the tobacco. Specifically, defendant admitted to Nordman during the inspection that he "mixed two or three blends, flavors of tobacco together to come up with a special blend . . . ." He also explained to Cleland that he repackaged the tobacco in tins and labeled it "360," his own label, before offering the tobacco for sale. These activities amounted to manufacturing a new product that defendant held out for sale as defendant's own brand.

The Court of Appeals' opinion connects two separate activities without evidentiary support. Due to the nature of the mistake, we cannot fully determine whether the Court erred in its construction of the statute or erred in its application of the standard it developed. Regardless, it veered off course and committed error, all the more disorienting viewed in relation to principles of statutory construction for tax and criminal statutes.

To reiterate, dictionary definitions of the word "manufacture" do not cover what the State Police discovered Mr. Shami doing. Mr. Shami was not "making" any "good," he was mixing goods already made and already in a final state of readiness for human consumption. He was

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[81] December 5, 2014 Preliminary Examination Transcript, pp. 54-55, 72.

[82] December 5, 2014 Preliminary Examination Transcript, pp. 16-18, 27, 54, 67-68, 71-72.

also taking plastic pouches of hookah tobacco out of shipping cases and placing the pouches into tins. None of this activity involves making or producing. The People presented no evidence to support the charge that Mr. Shami was manufacturing tobacco, and the Court of Appeals erred in reversing the Circuit Court.

I. Litigating This Position (Mixing is Manufacturing) Before Providing Guidance is a Secretive Approach to Enforcement, and the Court of Appeals' Decision Encourages this Inappropriate Treatment of Michigan Citizens.

At the time it passed the Tobacco Products Tax Act, the legislature expressly authorized Treasury to publish binding rules. MCL 205.433(2). Except for two narrow subjects in 1998 – tax stamps and manufacturers' representatives[83] – Treasury has not exercised its authority. Indeed, Treasury has never provided the public any guidance whatsoever about its views concerning the scope of the word "manufacturing" in the Tobacco Products Tax Act. The position Treasury litigates here involves the use of a secret body of agency law[84] interpreted and handed down to the enforcement function from a group of cloistered attorneys in Treasury's Tax Policy Division:

> Mr. Kenny:
>
> Does the Michigan Department of Treasury issue rules and regulations regarding what they consider to be manufacturing as interpreting the Tobacco Products Tax Act?
>
> Alicia Nordman (Manager of Treasury's Tobacco Tax Enforcement Unit):
>
> As far as rules and operations, I seek my guidance through our policy attorneys which they determine what is manufacturing.

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[83] Administrative Rules 205.451 through 205.455.

[84] *International Business Machines Corp v Department of Treasury*, 71 Mich App 526, 536-542; 248 NW2d 605 (1976). *Also see Tax Analysts v IRS*, 117 F3d 607 (1997) (discussion of FOIA and the application of deliberative process, attorney client and work product privileges in relation to Field Service Advice memoranda, legal guidance provided by attorneys in Internal Revenue Service's Office of Chief Counsel to field examiners).

Mr. Kenny:

But you've been with the Department of Treasury Tobacco Unit for 2 or 3 or 4 years; is that correct?

Alicia Nordman:

Since April of 2012.

Mr. Kenny:

And you have no familiarity with any rules or regulations issued by the department which define what manufacturing is; is that correct?

Alicia Nordman:

My training what the TPTA states and what I'm directed to do by the policy attorneys.

Mr. Kenny:

And who are the policy attorneys that you refer to?

Alicia Nordman:

Sal Gaglio (phonetic).

Mr. Kenny

So you made no independent determination as to what manufacturing is; is that correct?

Alicia Nordman:

I review the law and I get the policy attorneys interpretation on the law.

* * * * *

Mr. Kenny:

Is there an administrative bulletin?

Alicia Nordman:

I didn't bring with those with me so I believe there is something, but I can't reiterate right here because I don't have it in front of me.

Mr. Kenny:

Well you're in charge of this whole section. If there's a bulletin that describes manufacturing and you don't know what it is, how can you describe or advice someone when they violated the act?

Alicia Nordman:

The bulletin and my training are the same in regards to what the department interprets manufacturing as and that's mixing, blending, flavoring and creating a new product.

Mr. Kenny:

So you have written instructions that mixing and blending is manufacturing; is that what you're telling this court?

Alicia Nordman:

I -

Mr. Kenny:

You have a bulletin that states that?

Alicia Nordman:

In some form of words like that, I don't know if those are the specific wording, yes.[85]

It is one thing for the legislature to provide rule-making authority to an administrator shielded from the political process, but it is quite another thing for the administrator to completely bypass the safeguards of the Administrative Procedure Act and establish internal rules without the public's knowledge or opportunity to inform the rulemaking process through comment. This dispute is not fully analogous to *People v Taylor*, 495 Mich 923; 844 NW2d 707 (2014), where a

[85] December 5, 2014 Preliminary Examination Transcript, pp. 28-32.

complex published rule broadened the scope of the statute; rather this dispute involves the "secret law" which would be unknowable, not simply subject to imprecise application:

> It has been said that "[t]here is precious little difference between a secret law and a published regulation that cannot be understood." Lynch, Introduction to *In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law"* (Lynch ed) (Washington, DC: Cato Institute, 2009), p. xi. Many *malum prohibitum* offenses are defined in significant part by administrative rules and regulations. Vague regulations, amorphous definitions of the elements of the crime, and rules not altogether compatible with the provisions of the statute are distinguishing and continuingly problematic aspects of prosecutions of those administratively defined offenses. Again, as the United States Supreme Court has recognized:
>
> > A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. [*Connally v Gen Constr Co*, 269 US 385, 393 (1926) (quotation marks and citation omitted).]
>
> In the instant case, there was considerable confusion concerning the proper definition of the terms defining the substantive crime at issue, in particular the meaning of "contiguousness." The imprecise statute and administrative rule infused more confusion into an already complex area of law. It appears that both the parties and the district court itself experienced considerable difficulty in reconciling the words of the statutes with the words of the administrative rule to arrive at the proper understanding of "contiguous." When it is difficult for lawyers and judges to decipher the elements of the crime being prosecuted, it seems particularly problematic to adhere to the traditional maxim that the citizenry must be "presumed to know the law." See, e.g., *Mudge v Macomb Co*, 458 Mich 87, 109 n 22 (1998).

Rather than according Treasury's interpretation any deference, it should be accorded heightened scrutiny in light of its genesis. Stretching the scope of the term "manufacture" to cover activities that, in fact, do not make a product more suitable for its intended use but merely better market it,

renders MCL 205.422(m) (and any other provisions of the Tobacco Products Tax Act that use the word "manufacture" (or any of its variants)) unworkably vague through imprecision. *E.g., Connally v General Construction Co.,* 269 US 385, 394-395; 46 SCt 126; 70 LEd 322 (1926)(Phrases "current rate" and "in the locality" in Oklahoma wage law carrying potential fines or imprisonment for its violation, held violative of Due Process). While there is a well-recognized principle of avoiding an interpretation that would render a statute unconstitutional, in light of the difficulty in construction and application highlighted here (and again in the discussion of the felony charge for failure to keep proper invoices), this Court should consider whether the felony provisions of the Tobacco Products Tax Act or any portion of them should be severed. *Flamingo Paradise Gaming, LLC v Chanos*, 125 Nev 502, 511-515; 217 P3d 546 (2009) (criminal penalties set forth in Nevada Clean Indoor Air Act stricken as violative of vagueness prohibition of Due Process guaranty, although language survived judicial scrutiny for civil enforcement purposes.) If Alicia Nordman needed advice of counsel, if Treasury needs guidance from the Courts, if the District Court and the Court of Appeals disagree with the Circuit Court, no one can say with any conviction that Samer Shami should have been able to read the statute and tell from its plain language that he would incur felony liability for the actions the People have attributed to him.

There is no evidence in the record of the preliminary hearing to support a charge of manufacturing tobacco without a license. The Court of Appeals erred in reversing the Circuit Court.

III. The Court Of Appeals Erred In Extending Flow-Through Liability To Mr. Shami; Moreover, It Is Not A Felony To Accept A Generic Product Along With An Invoice Accurately Describing/Identifying The Generic Product.

A. Introduction

In Count 1, the People have charged Mr. Shami with possession of tobacco products other than cigarettes with a wholesale price of $250 or more without proper invoices in violation of MCL 205.426 and 205.428. Based on the testimony that invoices were not on site on the day of the inspection, the Court of Appeals found probable cause and reversed the Circuit Court. Statutory construction of MCL 205.426, 205.422 and 205.428 yields no reliable evidence of legislative intent to single out managers of tobacco retailers for some sort of flow-through felony liability.[86] Contrary to the Court of Appeals' reasoning, the definition of the word "retailer" in MCL 205.422, provides no basis to conclude that the legislature intended a flow-through liability for retail managers for failure to meet the record-retention requirements of MCL 205.426.

B. Standard of Review

The Court of Appeals' construction of the record-keeping and record-retention requirements and their relation to the Act's felony liability provisions is subject to *de novo* review. *Fluor Enterprises, Inc v Revenue Division, Department of Treasury,* 477 Mich 170, 174; 730 NW2d 722 (2007). Moreover:

When reviewing a bindover decision, the following standards apply:

> A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed [de novo] for error, and a decision to bind over a defendant is reviewed for abuse of discretion. In reviewing the district court's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion.... Similarly, this Court reviews the circuit court's decision de novo to

[86] Moreover, there is no evidence at all to support a conclusion that Mr. Shami had anything to do with the invoices being absent from the retail location at the time of the inspection.

> determine whether the district court abused its discretion. [People v. Orzame, 224 Mich. App. 551, 557, 570 N.W.2d 118 (1997) (citations omitted).]

People v Beydoun, 283 Mich App 314, 322; 770 NW2d 54 (2009). Application of an incorrect legal standard is an abuse of discretion:

> A district court's decision regarding a bindover is reviewed for an abuse of discretion, and "[a court] necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 131-132, 818 NW2d 432 (2012). Statutory construction is a question of law that is reviewed de novo. *People v Morey*, 461 Mich 325, 329, 603 NW2d 250 (1999).

People v Feeley, 499 Mich 429, 434; 885 NW2d 223 (2016).

C. Close Scrutiny of the Statutory Scheme Yields no Conclusion of Flow-Through Felony Exposure for Retail Managers.

1. The record retention rules are stricter for all licensees than for non-licensee retailers.

Before we launch into this analysis, note that MCL 205.423 imposes no licensing requirement on retailers, as retailers. Rather, retailers are licensed, if at all, under some other capacity. Still, MCL 205.426 extends record retention rules to all tobacco retailers:

> (1) A manufacturer, wholesaler, secondary wholesaler, vending machine operator, transportation company, unclassified acquirer, or retailer shall keep a complete and accurate record of each tobacco product manufactured, purchased, or otherwise acquired. Except for a manufacturer, the records shall include a written statement containing the name and address of both the seller and the purchaser, the date of delivery, the quantity, the trade name or brand, and the price paid for each tobacco product purchased. A licensee shall keep as part of the records a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product at the location where the tobacco product is stored or offered for sale. *A retailer shall keep as part of the records a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product at the location where the tobacco product is offered for sale for a period of 4 months from the date of purchase or*

> *acquisition.* The department may, by giving prior written approval, authorize a person licensed under this act or a retailer to maintain records in a manner other than that required by this subsection. Other records shall be kept by these persons as the department reasonably prescribes. [Italics added.]
>
> (5) All statements and other records required by this section shall be in a form prescribed by the department and shall be preserved for a period of 4 years and offered for inspection at any time upon oral or written demand by the department or its authorized agent by every wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, and retailer.

Note that unclassified acquirers may engage in retail activity and will be held to both sets of substantiation requirements. Also, note that retailers are subject to the limited, on-location, four-month record retention requirement; but thereafter, non-licensee retailers can store their records anywhere for four years, while licensee retailers (indeed, all licensees) must maintain their records on-site for the full four-year period. The statute draws a distinction between licensees and non-licensees in this regard and the stricter duty is on licensees. There is no indication, at least in this part of the statute, of any reason for a flow-through record retention duty for retail managers, and the difference is that while all licensees must keep records on-location for four years, non-licensee retailers have only a four-month obligation to keep their records on location (although they still have to maintain four years' worth of records somewhere).

MCL 205.422 defines the words "licensee," "person" and "retailer" as follows:

> (l) "Licensee" means a person licensed under this act.
>
> (o) "Person" means an individual, partnership, fiduciary, association, limited liability company, corporation, or other legal entity.
>
> (q) "Retailer" means a person other than a transportation company who operates a place of business for the purpose of making sales of a tobacco product at retail.

So, a retailer could be an individual or an entity that operates a retail tobacco store. A licensee could be an individual or an entity that is licensed under the Act. The obligation under 205.426(1) runs to the licensee and to the retailer. There is no evidence in the wording of the record retention statute that the legislature intended the duty to flow through to or obligate anyone else. There is no evidence in the wording of the record retention statute that the legislature intended to treat retailers and their managers materially differently in this regard. Put another way, there is no suggestion at all in the record retention statute that the manager of a non-retailer licensee would be treated any differently than the manager of a retailer, and there is no evidence in the record retention statute that where the retailer is an entity, felony liability is intended to flow through to the retail manager.

2. MCL 205.428(1) and (3) do not create a record retention obligation, but they do create a felony for its breach.

As relevant here, MCL 205.428(1) provides:

> A person, other than a licensee, who is in control or in possession of a tobacco product contrary to this act . . . shall be personally liable for the tax imposed by this act, plus a penalty of 500% of the amount of tax due under this act.

Moreover, MCL 205.428(3) provides:

> A person who possesses, acquires, transports, or offers for sale contrary to this act . . . tobacco products other than cigarettes with an aggregate wholesale price of $250.00 or more . . . is guilty of a felony, punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both.

These provisions do not create a record retention obligation. Rather, they establish a felony for failure to meet a duty imposed, if at all, elsewhere in the statute.

3. Stemming from the definition of the word "person" in MCL 205.422(o), a retailer could be an individual or an entity; but that does not mean by some sheer force of logic that the statutory language evinces an intent to expose both the entity and the individual manager to felony liability where, in a given case, both fit within the scope of the term "retailer."

The only legitimate evidence of legislative intent is the language of the statute itself, and the best indicator of intent is who bears the stricter record-keeping requirements. Licensees have to maintain their records on-sight for four years. Non-licensee retailers have to keep their records on site for only four months. The statute still requires them to keep four years' worth of records, but after four months of aging, the non-licensee retailer can keep the records anywhere.

Moreover, the conclusion that the statutory language does not specifically limit a retail manager's liability if he works as an employee of a retail entity raises an issue: it does not support a conclusion that the legislature intended liability to flow through to the retail manager. The stricter liability on licensees is a far better indicator.

4. There is no potential liability issue for managers of non-retailer entity licensees. The statutory record-keeping duty flows to the licensee, and if the licensee is an entity, the duty stops there.

There is no potential liability issue for managers of non-retailer entity licensees. The statutory duty flows to the licensee, and if the licensee is an entity, the duty stops there. After all, individuals can be licensees, but in a given case, there is only one actual licensee. To repeat for emphasis, if the non-retailer licensee is an entity, the statutory duty cannot flow through to the individual manager.

D. The Court Of Appeals' Error in *People v Assy* and *People v Shami* Appears to Stem From Some of the Same Interpretive Omissions We Described in Connection with Charge 2: This is a Criminal Tax Statute, its Scope Ought not be Extended by Forced Construction, and the Courts Should be Vigilant for Administrative Overreach.

In published decisions in *People v Assy,* __ Mich App __, Court of Appeals Docket No. 326274 (July 14, 2016) (Appendix, Tab 4) and *People v Shami*, __ Mich App __, Court of Appeals Docket No. 327065 (December 15, 2016) (Appendix, Tab 1), the Court of Appeals isolates the definition of the word "retailer" and concludes that the record retention duties and felony liability for their breach flows through to retail managers, whether or not the manager owns the business. This is a per se duty requiring no proof that the manager caused the failure, because the manager is required to ensure that the records are maintained on location. But, as addressed immediately above, focusing on the overall structure of the record retention rules and looking for any prominent distinction between retailers (licensee and non-licensee) and non-retailer licensees – a distinction that would reveal flow-through liability for managers of the former whereas the statutory language shields managers of the latter – nothing appears. Indeed, the stricter duty for licensees is evidence that no flow-through liability is intended. Moreover, we are not questioning the merit of a legislative decision/classification that flows inexorably from the plain language of the statute: instead, we are in an interpretive dilemma where flow-through liability is not an inescapable conclusion from the statute's plain language, and the overall impression, putting the pieces together and looking at the entire language, provides no reason to conclude that any such classification exists.

Many of the same principles discussed above in relation to Charge 2 apply with equal force here. Unless the legislature were to materially clarify its intent, there is no basis to infer multiple layers of liability. The Court of Appeals has resolved what can at best be considered a close question against Mr. Shami by implication, instead of through clearly expressed language.

The approach is clear error in a criminal tax context, especially where the administrator has made no attempt to use either express or inherent authority to provide binding or interpretive guidance and fair warning.

E. Assuming that Flow-Through Felony Liability Exists, There can be no Violation for Acceptance of an Accurate and Complete Invoice.

The Court of Appeals expressly declined to resolve this issue. (Slip. Op., fn 2, pp. 4-5) In declining, the Court sua sponte created a charge the People had not brought, a per se, flow-through felony liability for invoices missing at the moment the inspection commences. The People actually charged Mr. Shami with failure to keep "proper invoices." The alleged impropriety is the generic description of the tobacco – "Water pipe tobacco—Class I." – in the El Tahan invoices. As relevant here, MCL 205.426(1) required Sam Molasses to keep "a written statement containing . . . the trade name or brand . . . for each tobacco product purchased." Sam Molasses purchased a generic water pipe tobacco from El Tahan. The manufacturer gave the product no trade name or brand, and the description on the El Tahan invoices accurately described the sale. The People assert that the absence of a trade name or brand on the invoices triggers felony liability. The statute does not expressly prohibit the purchase of generic hookah tobacco, and once again, state enforcement officials have been administering the Act for 23 years without providing guidance on the subject. Guidance in this area is critical: the State Police and the Department of Treasury know by now – having conducted countless administrative inspections – exactly what they need in terms of paperwork and content to feel comfortable that they can trace product from purchase through inventory to ultimate sale, and if there are any refinements needed to do their job adequately, they need to tell the public, not just remain silent to catch the unaware. There is no suggestion of any attempt by Sam Molasses to thwart enforcement through this purely arm's length, business-motivated transaction, and enforcement personnel have no basis in the statutory language to question a fully documented transaction in

this manner. The language of the statute bears no indication that the purchase of generic hookah tobacco and acceptance of an invoice fully accurately reflecting that purchase yields felony liability. If Treasury and the State Police choose not to publish guidance to clarify the recordkeeping obligation, no consideration ought to be given to stretching the statute to cover facts not clearly constituting a felony. Again, lacking clear standards for administering the Act, this Court should consider whether the felony provisions of the Tobacco Products Tax Act or any portion of them should be severed. *Flamingo Paradise Gaming, LLC v Chanos*, 125 Nev 502, 511-515; 217 P3d 546 (2009) (criminal penalties set forth in Nevada Clean Indoor Air Act stricken as violative of vagueness prohibition of Due Process guaranty, although language survived judicial scrutiny for civil enforcement purposes.)

RELIEF REQUESTED

For all the reasons set forth above, Mr. Shami requests that this Court grant him leave to appeal the decision of the Court of Appeals. The Court of Appeals has committed reversible error, and its decision will result in material injustice to Mr. Shami – loss of liberty and property – if left in place. The decision breaks with established jurisprudence concerning principles of statutory construction for taxes and crimes. The decision is important to an entire industry, due to the limitless definition of "manufacturing" and the extension of personal liability beyond the entity retailer to individual managers. The decision touches upon fundamental issues of separation of powers, the rule of law, administrative overreach and enforcement of highly technical revenue law by silence and secret rule making. Granting this appeal will transcend

error correction and permit this Court to affect the well-being of the State and its citizens beyond correcting the injustice to Mr. Shami.

VARNUM LLP

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Dated: February 8, 2017

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February 8, 2017

Clerk of the Court
Third Circuit Court
Criminal Division
1441 St. Antoine Street
Detroit, MI 48226

RE: PEOPLE V. SAMER SHAMI
COURT OF APPEALS DOCKET NO.: 327065
WCCC CASE NO.: 14-011190-01-FH

Dear Clerk of the Court:

As required by Rule 7.305(A)(3), please note that Samer Shami will electronically file today an Application for Leave to Appeal the Court of Appeals' December 15, 2016 decision in Docket No. 327065.

Very truly yours,

VARNUM LLP

Jack M. Panitch

JMP/kmc

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February 8, 2017

Clerk of the Court
19th District Court
16077 Michigan Avenue
Dearborn, MI 48126

RE: PEOPLE V. SAMER SHAMI
COURT OF APPEALS DOCKET NO.: 327065
19TH DISTRICT COURT CASE NO.: 14S-1880-FY

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